

Unholy Parallels between *McCleskey v. Kemp* and *Plessy v. Ferguson*: Why *McCleskey* (Still) Matters

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I. INTRODUCTION

Why host a symposium on *McCleskey v. Kemp*¹ twenty-five years later? Not to critique it, for that was done quite exhaustively in numerous law review articles when it first came down and in a smattering of pieces since then. Not to celebrate it, if a quick perusal of the articles in this issue is any guide. And not to chronicle the erosion of its influence, for as we will address, only one post-*McCleskey* racial discrimination challenge has succeeded and that was in a very idiosyncratic setting.

While we do not know the thinking of the law review, we suspect that its membership was motivated by the same sentiment that motivates our participation: moral outrage. We recognize that not every writer in this symposium (or reader of this volume) shares that sentiment, and in the attempt to persuade those who do not, we offer a comparison to *Plessy v. Ferguson*,² hoping that all will agree on *Plessy*'s moral, as well as intellectual, bankruptcy.³

Part I considers the facts and opinions in each criminal case, first comparing the central doctrinal denial that permeates each, and then briefly addressing the ahistoricity of each. Part II documents parallels in the motivation behind each opinion. Part III summarizes the persistent challenges to each decision in the lower courts and the growing literature documenting the error of the decisions' underlying assumptions. Finally, Part IV looks at the pressures that undermined *Plessy* and looks for the forces that may ultimately topple *McCleskey*.

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¹ 481 U.S. 279 (1987).

² 163 U.S. 537 (1896).

³ This article therefore does not attempt a comprehensive critique of the *McCleskey* opinion, and addresses only those failings that find parallels in *Plessy*.

II. THE CASES

A. *The Underlying Facts*

1. Homer Plessy's Conviction

In 1890, the Louisiana legislature passed a law mandating racially segregated railway cars, making it a crime for “any passenger [to insist] on going into a coach or compartment to which by race he does not belong.”⁴ African Americans in New Orleans formed the Citizens Committee to repeal the law and persuaded Homer Plessy, a shoemaker in his twenties, to challenge it. On June 7, 1892, Plessy, “a citizen of the United States and a resident of the state of Louisiana, of mixed descent, in the proportion of seven eighths Caucasian and one eighth African blood,”⁵ bought a first class ticket from New Orleans to Covington on the East Louisiana Railway, boarded the train and sat in the coach reserved for white passengers. The conductor, who had been informed of Plessy's ancestry, asked Plessy if he was a “colored man,” and when Plessy said yes, ordered Plessy to leave. When he refused to do so, a police officer removed him and took him to jail, charging him with violating the Separate Cars statute. Plessy was released on bail of \$500.

Plessy argued to the presiding judge, John Ferguson, that the state law denied him his Thirteenth and Fourteenth Amendment rights, but Ferguson ruled that Louisiana had the right to regulate railroad companies—so long as they operated within state boundaries. Plessy, aided by the Committee of Citizens, sought a writ of prohibition from the Supreme Court of Louisiana, which upheld the lower court's ruling. The Committee then sponsored an appeal to the United States Supreme Court in 1895, submitting two briefs on Plessy's behalf, one signed by Albion W. Tourgée and James C. Walker and the other by former Solicitor General Samuel F. Phillips and his partner, F. D. McKenney. Both Tourgée and Phillips argued before the Supreme Court, Phillips relying solely on the Fourteenth Amendment and Tourgée making both Thirteenth and Fourteenth Amendment claims.

2. Warren McCleskey's Death Sentence

The facts of McCleskey's crime—as well as the facts of the Baldus study—are familiar to most readers, so we will be brief.

McCleskey, a black man, was convicted of two counts of armed robbery and one count of murder in the Superior Court of Fulton County, Georgia, on October 12, 1978. McCleskey's convictions arose out of the

⁴ *Plessy*, 163 U.S. at 541.

⁵ *Id.* at 538.

robbery of a furniture store and the killing of a white police officer during the course of the robbery. The evidence at trial indicated that McCleskey and three accomplices planned and carried out the robbery. All four were armed. McCleskey entered the front of the store while the other three entered the rear. McCleskey secured the front of the store by rounding up the customers and forcing them to lie face down on the floor. The other three rounded up the employees in the rear and tied them up with tape. The manager was forced at gunpoint to turn over the store receipts, his watch, and \$6. During the course of the robbery, a police officer, answering a silent alarm, entered the store through the front door. As he was walking down the center aisle of the store, two shots were fired. Both struck the officer. One hit him in the face and killed him.

Several weeks later, McCleskey was arrested in connection with an unrelated offense. He confessed that he had participated in the furniture store robbery but denied that he had shot the police officer. At trial, the State introduced evidence that at least one of the bullets that struck the officer was fired from a .38 caliber Rossi revolver. This description matched the description of the gun that McCleskey had carried during the robbery. The State also introduced the testimony of two witnesses who had heard McCleskey admit to the shooting.⁶

McCleskey was convicted and sentenced to death.

David Baldus, a professor at the University of Iowa College of Law, included McCleskey's crime in a database of the 2,000-plus murders that occurred in Georgia during the 1970s. After examining 230 variables that could have provided nonracial explanations, Baldus concluded that defendants charged with killing white victims were 4.3 times more likely to be sentenced to death than defendants charged with killing a black victim, and that black defendants were 10% more likely to receive a death sentence than were other defendants.⁷ Warren McCleskey—a black defendant who had killed a white victim—was therefore in the racial category most likely to be sentenced to death. Moreover, race effects were most prominent in the middle range of aggravation, a class into which McCleskey's case fell. In fact, as Justice Brennan's dissent pointed out, McCleskey's case was a particularly apt one to consider racial disparities, for Baldus's analysis showed that the "the jury more likely than not would have spared McCleskey's life had his victim been black."⁸

⁶ 481 U.S. at 283.

⁷ *Id.* at 287.

⁸ *Id.* at 325 (Brennan, J., dissenting).

B. *The Central Doctrinal Denial*

The majority opinions in *Plessy* and *McCleskey* each turn on the correctness of a central premise, a premise that as II.C. and D will document, ignored both precedent and history.

1. Separate but Not Unequal

Can mandated racial segregation evade condemnation (or at least strict scrutiny) under the equal protection clause if the “separate” conditions are “equal”? Although the phrase does not appear in the majority opinion,⁹ *Plessy* is remembered as establishing “separate but equal” as the test for the permissibility of racially segregated accommodations.¹⁰ After acknowledging that the “object of the [Fourteenth] Amendment was undoubtedly to enforce the absolute equality of the two races before the law,” the majority denied that it was “intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either.”¹¹ Fair—or at least plausible—so far. Read narrowly, this sentence simply takes note of the state action requirement of the Equal Protection Clause; private parties may discriminate in ways that the Clause forbids to state actors. It is the next line that takes the big step towards adopting the doctrinal denial central to *Plessy*, and approving state-mandated segregation. According to the majority, “Laws permitting, and even requiring, their separation, in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power.”¹² Later in the opinion, the Court went a step further, proclaiming that any inequality resulting from the mandated segregation was the fault of African Americans:

We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.”¹³

⁹ The phrase does appear in the dissent, but only to describe the provisions of the statute, not to characterize the Court’s holding. *Plessy*, 163 U.S. at 552 (Harlan, J., dissenting).

¹⁰ See Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 229–30 (1991).

¹¹ *Plessy*, 163 U.S. at 544.

¹² *Id.*

¹³ *Id.* at 551.

2. Unexplained but Not Invidious

What should be inferred from the statistical evidence that Georgia's capital punishment system discriminated on the basis of race? The majority opinion, written by Justice Powell, held that it established neither a Fourteenth Amendment Equal Protection Clause violation nor an Eighth Amendment Cruel and Unusual Punishment claim. Under well-established doctrine, an equal protection claim requires proof of discriminatory purpose, but according to the Court, *McCleskey* had to prove that "the decision-makers in *his* case acted with discriminatory purpose," and because he offered "no evidence specific to his own case" he failed in his burden.¹⁴

As we will discuss shortly, the *McCleskey* Court's treatment of the proof requirements of an equal protection claim does not comport with precedent from other equal protection cases. But it is its treatment of the cruel and unusual punishment claim that most resembles the *Plessy* Court's adamant doctrinal stance that separate did not mean or imply unequal. With respect to the cruel and unusual punishment claim—which the Court acknowledged required only the lesser showing of "an unacceptable *risk* [that] racial prejudice influence[d] capital sentencing decisions"¹⁵ the *McCleskey* Court, like the *Plessy* Court, insisted it saw no evil. It dismissed the Baldus data as establishing "[a]t most . . . a discrepancy that appears to correlate with race"¹⁶ and then "decline[d] to assume that what is unexplained is invidious."¹⁷

C. Contrasts with the Jury Selection Cases

The equal protection analysis in both *Plessy* and *McCleskey* contrasts with that employed by the Court in contemporaneous equal protection cases involving jury selection.

1. *Plessy* and *Strauder*

Strauder v. West Virginia, the very first post-Civil War race discrimination case to reach the Supreme Court, struck down the murder conviction of an African American because state law excluded African Americans from serving on grand or petit juries.¹⁸ The *Plessy* majority attempted to distinguish *Strauder*, claiming that "The distinction between laws interfering with the political equality of the negro and those requiring the separation of the two races in schools, theaters, and railway

¹⁴ *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987).

¹⁵ *Id.* at 309 (emphasis added).

¹⁶ *Id.* at 312.

¹⁷ *Id.* at 313.

¹⁸ *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879).

carriages has been frequently drawn by this court.”¹⁹ But in fact, prior to *Plessy* the Court had never drawn that distinction.²⁰ Moreover, *Strauder* contains a very broad description of the purpose and effect of the Fourteenth Amendment, one that makes no exception for state-mandated racial segregation:

It was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States. It not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any State the power to withhold from them the equal protection of the law, and authorized Congress to enforce its provisions.²¹

Moreover, the shallowness of the *Plessy* Court’s purported distinction was pithily plumbed by Justice Harlan, who wrote:

[T]he suggestion that social equality cannot exist between the white and black races in this country. . . is scarcely worthy of consideration; for social equality no more exists between two races when traveling in a passenger coach or a public highway than when members of the same races sit by each other in a street car or in the jury box, or stand or sit with each other in a political assembly, or when they use in common the streets of a city or town, or when they are in the same room for the purpose of having their names placed on the registry of voters, or when they approach the ballot box in order to exercise the high privilege of voting.²²

2. *McCleskey* and *Castaneda*

Justice Powell’s attempt to distinguish *Castaneda v. Partida*²³ is less feeble than Justice Brown’s attempt to distinguish *Strauder*, but it is no more persuasive. Because in other cases, particularly in the line of jury selection cases, the Court had previously held that statistics alone could establish discriminatory purpose, Justice Powell had to explain why the Baldus statistics did not do so. Ordinarily, he wrote, statistical disparities must be “stark” in order to prove purposeful

¹⁹ *Plessy*, 163 U.S. at 545.

²⁰ The majority describes *Strauder*, and then claims that quite different precedents applied to segregation. *Id.* But in fact, the Court opinion does not cite any Supreme Court cases involving challenging *state-mandated* racial segregation as a violation of equal protection—because there were none. *See id.*

²¹ *Strauder*, 100 U.S. at 306–07.

²² *Plessy*, 163 U.S. at 561 (Harlan, J., dissenting).

²³ 430 U.S. 482 (1977).

discrimination, and the Baldus study disparities were not stark.²⁴ Even in this first step, there was a bit of a cheat. While it is true that the disparities established in *Yick Wo v. Hopkins*,²⁵ for example, presented a starker *pattern*, the Court had previously included much less stark cases in that category and characterized the clear pattern category as satisfied by “a clear pattern unexplainable on grounds other than race [that] emerges from the effect of the state action.”²⁶ Initially, one might have thought that a 300 percent overrepresentation in the ranks of the condemned was not only “stark,” in the colloquial sense, but “unexplainable on grounds other than race” *given that 230 variables had been investigated, and that the overrepresentation could not be explained in a non-invidious way*.²⁷

Although the Court ignored its previous definition of “clear pattern” cases, it could hardly ignore the jury selection cases. In two strands of cases involving jury selection—the venire selection cases and the peremptory challenge cases—the Court had accepted not-so-extreme statistical disparities as sufficient to shift the burden of proof to the state.²⁸ As Justice Blackmun’s dissent explains:

In *Castaneda*, we explained that in jury-selection cases where the criminal defendant is attempting to prove that there was discriminatory exclusion of potential jurors we apply the “rule of exclusion” method of proof. The underlying rationale is that “[i]f a disparity is sufficiently large, then it is unlikely that it is due solely to chance or accident, and, in the absence of evidence to the contrary, one must conclude that racial or other class-related factors entered into the selection process.”²⁹

Blackmun then goes on to describe the three-prong test that governs venire selection claims, which the Court had recently adapted to peremptory challenge

²⁴ *McCleskey v. Kemp*, 481 U.S. 279, 293 (1987).

²⁵ 118 U.S. 356 (1886). In *Yick Wo*, 150 of the 310 Chinese owners of wood laundries were arrested for violating the ordinance prohibiting such laundries, and none of the 80 some non-Chinese owners of wood laundries were arrested. Similarly, in *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960), a Fifteenth Amendment case, the state legislature’s gerrymandering was held to have established racial discrimination where 395 of 400 black voters were excluded and no white voters were excluded.

²⁶ *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (citing not only *Yick Wo* and *Gomillion*, but also *Guinn v. United States*, 238 U.S. 347, 358 (1915), and *Lane v. Wilson*, 307 U.S. 268, 271 (1939), neither of which presented as stark a statistical disparity).

²⁷ *McCleskey*, 481 U.S. at 287.

²⁸ Justice Powell also attempted to distinguish the Title VII cases, which, like the venire selection cases, accept multiple regression statistics as proof of intent. We do not address that distinction here in part because it has the same weaknesses as does his distinction of the venire selection cases. More importantly, the Title VII cases *can* be distinguished on another ground—that they involve an interpretation of a congressional statute and not the equal protection clause—and the desirability of different standards of proof for statutory as opposed to constitutional violations is outside the scope of this article.

²⁹ *McCleskey*, 481 U.S. at 352 n.6 (Blackmun, J., dissenting) (citations omitted).

claims. He shows in great detail that *McCleskey*'s evidence meets each of those prongs,³⁰ an argument the majority opinion does not refute because it argues that the venire selection and peremptory challenge cases are distinguishable and therefore governed by different standards.

Justice Powell began by explaining that the capital sentencing decision is made by a "jury . . . unique in its composition [whose] decision rest[s] on . . . innumerable factors that vary according to the characteristics of the individual defendant and the facts of the particular capital offense."³¹ According to Justice Powell, venire selection cases, such as *Castaneda*, involved less complicated decisions and fewer decision-makers.³² He then reasoned that the larger number of factors and actors would increase the likelihood that something other than race was responsible for racial effects. "Thus," he concluded, "the application of an inference drawn from the general statistics to a specific decision in a trial and sentencing is simply not comparable to the application of an inference drawn from general statistics to a specific venire-selection . . . case."³³ Of course, if *McCleskey* were relying on bare, uncontrolled statistical disparities, this distinction would have substantial power. But the majority's distinction ignores that, as Justice Brennan's dissent points out:

McCleskey's statistics have particular force because most of them are the product of sophisticated multiple-regression analysis. Such analysis is designed precisely to identify patterns in the aggregate, even though we may not be able to reconstitute with certainty any individual decision that goes to make up that pattern. Multiple-regression analysis is particularly well suited to identify the influence of impermissible considerations in sentencing, since it is able to control for permissible factors that may explain an apparent arbitrary pattern. While the decision-making process of a body such as a jury may be complex, the Baldus study provides a massive compilation of the details that are most relevant to that decision. As [the Supreme Court] held in the context of Title VII of the Civil Rights Act of 1964 . . . a multiple-regression analysis need not include every conceivable variable to establish a party's case, as long as it includes those variables that account for the major factors that are likely to influence decisions. In this case, Professor Baldus in fact conducted additional regression analyses in response to criticisms and suggestions by the District Court, all of which confirmed, and some of which even strengthened, the study's original conclusions.³⁴

³⁰ *Id.* at 352–58.

³¹ *Id.* at 294.

³² *Id.* at 295 n.14.

³³ *Id.* at 294–95.

³⁴ *Id.* at 327–28 (Brennan, J., dissenting).

Indeed, as would later be revealed from Justice Marshall's papers, at least one member of the majority conceded that the statistical data did not fail to prove purposeful racial discrimination. In a memorandum to Justice Powell, Justice Scalia wrote:

I plan to join Lewis [Powell]'s opinion in this case, with two reservations. I disagree with the argument that the inferences that can be drawn from the Baldus study are weakened by the fact that each jury and each trial is unique, or by the large number of variables at issue. And I do not share the view, implicit in the opinion, that an effect of racial factors upon sentencing, if it could only be shown by sufficiently strong statistical evidence, would require reversal. Since it is my view that the unconscious operation of irrational sympathies and antipathies, including racial, upon jury deliberations and (hence) prosecutorial decisions is real, acknowledged in the decisions of his court, and ineradicable, I cannot honestly say that all I need is more proof. Sincerely, Nino.³⁵

Justice Powell did not explicitly recognize that the nature of multiple regression undercut his purported distinction, but he did offer a fallback argument: that the jury venire cases are different because in those cases the decision-maker has the opportunity to explain the statistical disparity, but "the State ha[s] no practical opportunity to rebut the Baldus study."³⁶ According to Powell, "controlling considerations...of public policy" preclude calling jurors to testify concerning their deliberations and "suggest the impropriety of our requiring prosecutors to defend their decisions to seek death penalties"³⁷

At this point, in a footnote, Powell mentions the other jury selection case in tension with the Court's equal protection analysis of *McCleskey*'s claim: *Batson v. Kentucky*.³⁸ *Batson*, decided only months before *McCleskey*, condemns the racially motivated exercise of peremptory challenges—and upon the showing of a prima facie case of discrimination, requires the prosecutor to provide a racially neutral reason for the challenge, which the trial court must then evaluate. But *Batson* is different, said Powell, because "[r]equiring a prosecutor to rebut a study that analyzes the past conduct of scores of prosecutors is quite different from requiring a prosecutor to rebut a contemporaneous challenge to his own acts."³⁹

More broadly, one might wonder why either the state's interest in the secrecy of jury deliberations or prosecutors' interests cloaking their decisions to seek the death penalty trump the defendant's interest in a racially neutral determination of

³⁵ Memorandum to the Conference from Justice Antonin Scalia in No. 84-6811—*McCleskey v. Kemp* File, Thurgood Marshall Papers, The Library of Congress, Washington, D.C.

³⁶ *McCleskey*, 482 U.S. at 362 (Brennan, J., dissenting).

³⁷ *Id.* at 296 (citations omitted) (internal quotation marks omitted).

³⁸ *Id.* at 297 n.17.

³⁹ *Id.*

whether he should be executed. This is especially true since most states brook some exceptions to juror secrecy, such as inquiry into outside influences, and since inquiry into another prosecutorial discretionary decision had just been mandated by the Supreme Court in *Batson*. Most importantly, however, rebuttal by the state would not have to take the form of testimony concerning the reasons for a verdict or a decision to seek death. In fact, such testimony would often be only barely probative, since neither a juror nor a prosecutor would necessarily be aware of (or willing to admit) the influence of race on his or her decision-making. An entire body of social and psychological literature available to the Court at that time attested to the influence of unconscious racism and the inhibiting effect of the social norm against racial bias on disclosure of racism that is conscious.⁴⁰ What the state (and individual prosecutors) *could* do is the same thing they were required to do in *Castaneda* and *Batson*, provide the true, race-neutral explanation for the disparity, if there was one. That would require presenting a competing statistical study, or *at least* the suggestion of the factors that were producing the purportedly spurious correlation. But, as the dissent pointed out, when faced with such criticisms, Baldus conducted additional regression analyses, “all of which confirmed, and some of which even strengthened, the study’s original conclusions.”⁴¹ Thus, the Court’s Eighth Amendment pronouncement that it “declined to find what was unexplained invidious,” whatever its status under the Eighth Amendment precedent, seems clearly wrong under conventional equal protection analysis. The Court had previously accepted less strong statistical evidence—less strong both in the size of the disparity and in the control of possibly spurious correlations—as shifting the burden to the state to explain the racial disparity. Why would it have not have done so here? Unless of course it was that the majority thought there *was* no other explanation, a conclusion with which Justice Scalia apparently agreed, and one that consideration of the history surrounding race and the imposition of death in this country would virtually compel.⁴²

D. Ahistoricity

Both *Plessy* and *McCleskey* are characterized by a willful ignorance of history, an ignorance as striking as their departures from precedent.

1. The History of Slavery, Emancipation, and Segregation

Charles Black characterized the question before the Court in *Brown* as “whether discrimination inheres in that segregation which is imposed by law in the

⁴⁰ See generally Sheri L. Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611 (1984-1985) (reviewing the literature available in 1985).

⁴¹ *McCleskey*, 481 U.S. at 327–28 (Brennan, J., dissenting).

⁴² Memorandum to the Conference from Justice Antonin Scalia, *supra* note 35.

twentieth century in certain specific states in the American Union.”⁴³ Corrected for the appropriate century, the same thing could have been said about the question facing the *Plessy* Court. As Black argued, “that question has meaning and can find an answer only on the ground of history and of common knowledge about the facts of life in the times and places aforesaid.”⁴⁴ Justice Harlan answered that question without equivocation:

It was said in argument that the statute of Louisiana does not discriminate against either race, but prescribes a rule applicable alike to white and colored citizens. But . . . [e]very one knows that [the law] had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons.⁴⁵

A charitable reader contrasting the majority opinion with that of Justice Harlan might infer that Justice Harlan was either particularly advanced in his racial views, or else held exceptionally insightful views. Neither of those inferences, however, can be correct. Harlan, as his opinions in other cases document, was hardly racially progressive. Moreover, no particular insight was required, for the Court in *Strauder* had acknowledged both the history that necessitated the Fourteenth Amendment’s protection of African Americans and the certainty that bias against them would persist and take new forms.

The true spirit and meaning of the amendments . . . cannot be understood without keeping in view the history of the times when they were adopted, and the general objects they plainly sought to accomplish. At the time when they were incorporated into the Constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed. Discriminations against them had been habitual. It was well known that in some States laws making such discriminations then existed, and others might well be expected.⁴⁶

⁴³ Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 427 (1960).

⁴⁴ *Id.*

⁴⁵ *Plessy v. Ferguson*, 163 U.S. 537, 556–57 (1896) (emphasis added).

⁴⁶ *Strauder v. West Virginia*, 100 U.S. 303, 305 (1879).

Strauder could hardly have been plainer: segregation's "badge of inferiority" does not, as *Plessy*'s majority would have it,⁴⁷ stem from the construction "the colored race chooses to put . . . upon it," but predictably arises because "those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike."⁴⁸ The difference between Harlan and the *Plessy* majority was simple: honesty.

2. The Racial History of Capital Punishment

McCleskey did not rely solely upon statistical evidence of racial disparities to establish purposeful discrimination but contended that historical evidence supported the inference of invidious intent. The significance of such evidence was established by *Arlington Heights v. Metropolitan Housing Development Corporation*, which held that evaluation of a claim of purposeful discrimination requires "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."⁴⁹ Included in that inquiry is "the historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes."⁵⁰ Nonetheless, the *McCleskey* majority dismissed this evidence to the following footnote:

McCleskey relies on "historical evidence" to support his claim of purposeful discrimination by the State. This evidence focuses on Georgia laws in force during and just after the Civil War. Of course the "historical background of the decision is one evidentiary source" for proof of intentional discrimination. But unless historical evidence is reasonably contemporaneous with the challenged decision, it has little probative value. Although the history of racial discrimination in this country is undeniable, we cannot accept official actions taken long ago as evidence of current intent.⁵¹

This footnote, if not disingenuous, is at least mistaken and misleading. *McCleskey*'s historical evidence certainly *included* racially discriminatory statutes and practices from the Antebellum and Reconstruction periods, but it was not *confined* to those periods. Most prominently, modern evidence included racial patterns from capital rape prosecutions that were very "stark" patterns. More broadly, although much of Western history can be read as documentation of the influence of race on decision-making, it undoubtedly has had a more pronounced—and invidious—effect in criminal matters, where stereotypes of

⁴⁷ *Plessy*, 163 U.S. at 557.

⁴⁸ *Strauder*, 100 U.S. at 306.

⁴⁹ *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977).

⁵⁰ *Id.* at 267.

⁵¹ *McCleskey v. Kemp*, 481 U.S. 279, 298 n.20 (1987) (citations omitted).

criminality are salient, and out-group threats are particularly pronounced. To ignore this is to ignore history, common sense, and science—as the *McCleskey* majority undoubtedly knew. As Justice Brennan pointed out, the Court’s celebration of its “‘unceasing efforts’ to eradicate racial prejudice from our criminal justice system” actually acknowledges the ongoing influence of history:

These efforts, however, signify not the elimination of the problem but its persistence. Our cases reflect a realization of the myriad of opportunities for racial considerations to influence criminal proceedings: in the exercise of peremptory challenges, in the selection of the grand jury, in the selection of the petit jury, in the exercise of prosecutorial discretion, in the conduct of argument, and in the conscious or unconscious bias of jurors.⁵²

III. THE PRESSURES

Why do *Plessy* and *McCleskey* sidestep both precedent and history? We speculate that the answer lies in precedent, both societal and their judicial equivalents.

A. Societal Fears

1. Rising Anti-Black Sentiment in the 1890s

“One cannot begin to understand the Court’s racist decisions without first understanding the racist times in which they were rendered.”⁵³ Race relations in the United States, particularly in the South, worsened sharply in the last two decades of the nineteenth century.

Economic, political and social frustrations had pyramided to a climax of social tensions. No real relief was in sight from the long cyclical depression of the nineties, an acute period of suffering that had only intensified the distress of the much longer agricultural depression. Hopes for [political reform] had likewise met with cruel disappointments and frustration. There had to be a scapegoat. And all along the signals were going up to indicate that the Negro was an approved object of aggression. These ‘permissions-to-hate’ came from sources that had formerly denied such permission. They came from the federal courts in numerous opinions, from Northern liberals eager to conciliate the South, from Southern conservatives who had abandoned their race policy of moderation in their struggle against the Populists, from the Populists in

⁵² *Id.* at 333 (Brennan, J., dissenting) (internal citation omitted).

⁵³ Michael J. Klarman, *The Plessy Era*, 1998 SUP. CT. REV. 303, 304 (1999).

their mood of disillusionment with their former Negro allies, and from a national temper suddenly expressed by imperialist adventures and aggressions against colored peoples in distant lands.⁵⁴

2. Rising Crime and Fear of Crime in the 1980s

Although crime rates began to rise in the 1960s, it was not until the 1980s that the public began to react to those rates by deeming rehabilitative sentencing a failure.⁵⁵ As has often been observed, this led to the demise of indeterminate sentencing, as well as increasingly longer sentences. Because a belief in rehabilitation is associated with opposition to the death penalty,⁵⁶ it is not surprising that popular support for the death penalty reached its high point in the late 1980s.⁵⁷

B. Judicial Fears

In both *Plessy* and *McCleskey*, the judicial fear of a slippery slope is made explicit. As an abstract matter, consideration of such slopes is neither an uncommon nor necessarily bad aspect of judicial decision-making, but examining what lies at the bottom of the slope is often instructive. For both *Plessy* and *McCleskey*, the bottom of the slope is a place we think should not be feared.

1. The Specter of Social Integration

The *Plessy* Court did not directly argue that striking down the Louisiana law would lead to social integration of frightening kinds, but the opinion suggests that the majority either feared or found it useful to call upon the fear of social integration. As discussed above, the majority purported to distinguish *Strauder* on the ground that *Strauder* was political as opposed to merely social. In so doing, it called upon “[t]he most common instance” of social segregation: “the establishment of separate schools for white and colored children, which have been held to be a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced.”⁵⁸ But in case concerns about integrated education were not enough, the Court also alluded to miscegenation, perhaps telegraphing the significance of the

⁵⁴ C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 64 (1955).

⁵⁵ ARTHUR W. CAMPBELL, *LAW OF SENTENCING* § 4.2 (2011).

⁵⁶ See, e.g., *Faith Based Position*, NEBRASKANS AGAINST THE DEATH PENALTY, <http://www.nadp.net/faith.htm> (last visited Oct. 26, 2012) (listing religious groups opposed to the death penalty and citing possibility of redemption and rehabilitation as one reason for opposition).

⁵⁷ Fred Backus, *Support for Death Penalty for Convicted Murderers at 20 Year Low*, CBS NEWS (Sept. 26, 2011), http://www.cbsnews.com/8301-503544_162-20111657-503544.html.

⁵⁸ *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896).

point by a separate paragraph that contains one sentence: “Laws forbidding the intermarriage of the two races may be said in a technical sense to interfere with the freedom of contract, and yet have been universally recognized as within the police power of the state.”⁵⁹

These allusions, however, are subtle compared to the explicit slippery slope argument made by the majority in *McCleskey*.

2. The Specter of Other Racial Discrimination Claims

Two additional concerns inform our decision in this case. First, McCleskey’s claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system. The Eighth Amendment is not limited in application to capital punishment, but applies to all penalties. Thus, if we accepted McCleskey’s claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty. Moreover, the claim that his sentence rests on the irrelevant factor of race easily could be extended to apply to claims based on unexplained discrepancies that correlate to membership in other minority groups, and even to gender. Similarly, since McCleskey’s claim relates to the race of his victim, other claims could apply with equally logical force to statistical disparities that correlate with the race or sex of other actors in the criminal justice system, such as defense attorneys, or judges. Also, there is no logical reason that such a claim need be limited to racial or sexual bias. If arbitrary and capricious punishment is the touchstone under the Eighth Amendment, such a claim could—at least in theory—be based upon any arbitrary variable, such as the defendant’s facial characteristics, or the physical attractiveness of the defendant or the victim, that some statistical study indicates may be influential in jury decisionmaking. As these examples illustrate, there is no limiting principle to the type of challenge brought by McCleskey. The Constitution does not require that a State eliminate any demonstrable disparity that correlates with a potentially irrelevant factor in order to operate a criminal justice system that includes capital punishment. As we have stated specifically in the context of capital punishment, the Constitution does not “plac[e] totally unrealistic conditions on its use.”⁶⁰

Thus, the Court argues that if upheld, McCleskey’s claims will spread, giving rise to both other racial (or even gender) discrimination claims against criminal

⁵⁹ *Id.* at 545 (1896). Despite characterizing laws forbidding interracial marriage as being “universally recognized as within the police power of the state,” the opinion only cites one case so holding, *State v. Gibson*, 36 Ind. 389, 404 (1871).

⁶⁰ *McCleskey v. Kemp*, 481 U.S. 279, 314–19 (1987) (internal citations omitted).

justice system actors and to all kinds of claims of irrational discrimination. There is no better answer to this than Justice Brennan's:

Taken on its face, [the Court's unwillingness to regard Petitioner's evidence as sufficient, based in part on the fear that recognition of McCleskey's claim would open the door to widespread challenges to all aspects of criminal sentencing] seems to suggest a fear of too much justice. Yet surely the majority would acknowledge that if striking evidence indicated that other minority groups, or women, or even persons with blond hair, were disproportionately sentenced to death, such a state of affairs would be repugnant to deeply rooted conceptions of fairness. The prospect that there may be more widespread abuse than McCleskey documents may be dismaying, but it does not justify complete abdication of our judicial role. The Constitution was framed fundamentally as a bulwark against governmental power, and preventing the arbitrary administration of punishment is a basic ideal of any society that purports to be governed by the rule of law.

[T]he Court's fear that McCleskey's claim is an invitation to descend a slippery slope also rests on the realization that any humanly imposed system of penalties will exhibit some imperfection. Yet to reject McCleskey's powerful evidence on this basis is to ignore both the qualitatively different character of the death penalty and the particular repugnance of racial discrimination, considerations which may properly be taken into account in determining whether various punishments are "cruel and unusual." Furthermore, it fails to take account of the unprecedented refinement and strength of the Baldus study.⁶¹

IV. THE AFTERMATH

A. *Litigation Campaigns*

1. The NAACP Strategy to Overturn "Separate But Equal"

African-Americans did not decide to merely accept *Plessy* as the immutable law of the land. And, the fact that Jim Crow segregation quickly spread to most aspects of Southern society only strengthened the resolve to overturn it. But the question facing the NAACP was how to go about it. What approach should be adopted? Should the basic framework of *Plessy* be accepted and should suits be brought to force school districts, for example, to provide true equality between white and black schools? Or should segregation be attacked head on as being the evil that it was and as being inherently unequal? Over time, and not without

⁶¹ *Id.* at 339–40 (Brennan, J., dissenting).

dissent,⁶² a strategy for integration emerged, aided by some chinks in the *Plessy* armor.⁶³ The NAACP would start by challenging segregation in higher education.

The lawsuits contained both frontal assaults on *Plessy*'s "separate but equal" doctrine, but also narrower grounds challenging the lack of a "separate but equal" institution or the equality of the "separate but equal" institution. And they were almost universally successful. The NAACP prevailed in 1936 in the Maryland state courts which ordered that Donald Murray be admitted to Maryland's all white law school because there was no law school for blacks.⁶⁴ In 1938 the Supreme Court of the United States ordered that Lloyd Gaines be admitted to the University of Missouri School of Law for the same reason.⁶⁵ World War II stalled the litigation, but soon thereafter the challenges resumed in the higher education context in Oklahoma and Texas. The cases, *Sweat* and *McLaurin*, eventually made their way to the Supreme Court. And much to the NAACP's relief, the United States filed an amicus curiae brief on behalf of the black plaintiffs arguing that *Plessy* was wrong as a matter of law and should be overruled. The Court did ultimately rule for the plaintiffs, but it did so on the narrower ground that Texas' black law school was inferior to the white law school in virtually every respect,⁶⁶ and that Oklahoma's "solution" of admitting the plaintiff to its white law school but confining him to certain seats in the classroom, areas of the library and the cafeteria was unequal as it "handicapped [him] in his pursuit of effective graduate instruction."⁶⁷

Following these decisions, however, the attorneys at LDF decided to file only cases that asked for an end to segregation.⁶⁸ They also took the legal fight down a notch from graduate and professional schools to undergraduate education. In the early 1950s, through the Fund's efforts and the efforts of other civil rights lawyers,

⁶² Some prominent black leaders, e.g., W.E. B. Dubois, the founder of the NAACP, argued that while integration in theory was desirable, sending black children to white schools where they would be ostracized and treated with hostility was not.

⁶³ As discussed above, one of its weaknesses was Justice Harlan's dissent. Given Harlan's stature, the dissent continued to loom, in the words of Charles Evans Hughes, like "an appeal to the brooding spirit of the law, to the intelligence of a future day" CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES 68 (1928). Furthermore, after *Plessy*, the Court did not overrule either *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880), which held that African-Americans could not be excluded from juries because it was "practically a brand upon them, affixed by the law" or *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886), holding unconstitutional a San Francisco ordinance banning laundries in wooden buildings that had a discriminatory impact on Chinese-Americans. Then in 1917, twenty years after *Plessy*, in *Buchanan v. Warley*, 245 U.S. 60, 81 (1917), the Court struck down a Louisville, Kentucky law which barred African-Americans from living in certain parts of the city as an alienation of property. In doing so, the Court specifically held that *Plessy* was inapplicable, *id.* at 82, thereby underlining the doctrinal tensions in the cases.

⁶⁴ *Pearson v. Murray*, 169 Md. 478, 593 (Md. 1936).

⁶⁵ *State of Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 345 (1938).

⁶⁶ *Sweat v. Painter*, 339 U.S. 629, 641 (1950).

⁶⁷ *McLaurin v. Oklahoma*, 339 U.S. 637 (1950).

⁶⁸ JACK GREENBERG, *CRUSADERS IN THE COURTS* 87 (1994).

many public and private universities began admitting African Americans.⁶⁹ From colleges, the fight went to segregation in America's public elementary, junior high and high schools. While some were wary of only asking for desegregation, Thurgood Marshall and others at LDF were convinced that given the extreme resource and quality disparities between black and white schools, an end to segregation was the only remedy worth fighting for.⁷⁰ The cases that later became consolidated and are now known as *Brown v. Board of Education*⁷¹ were filed, litigated, and culminated in the Supreme Court ending, at least in theory, de jure segregation and overruling *Plessy*.⁷²

2. Post-McCleskey Litigation

Attorneys for death-sentenced inmates also did not simply shrug their shoulders and say, "Oh well, there is no longer any need to litigate race claims." Instead, attempting to work within *McCleskey*'s focus on discriminatory purpose and the multiplicity of decision-makers, many attorneys, including the authors of this article, presented courts with statistical studies which focused on particular counties (thus eliminating the multiple decision-maker problem) as well as all available evidence that the prosecution acted with discriminatory purpose.⁷³

For example, Earl Matthews, a South Carolina death row inmate, presented the federal courts with a statistical study which established that during the elected prosecutor's ten years in office, he sought the death penalty in black defendant/white victim cases 40% of the time, but only 2.9% of the time in black defendant/black victim cases.⁷⁴ This statistical discrepancy could occur by chance only less than one time in one thousand.⁷⁵ During the same time frame, the prosecutor sought the death penalty in 32.3% of all white victim murder cases and in 5.2% of all black victim murder cases. This discrepancy too could happen by

⁶⁹ *Id.* at 90.

⁷⁰ *Id.* at 120. Some have criticized LDF's approach, unfairly in our view, for being poorly conceived and badly implemented. Philip Elman, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation: 1946-1960: An Oral History*, 100 HARV. L. REV. 817, 837 (1987); see also Randall Kennedy, *A Reply to Phillip Elman*, 100 HARV. L. REV. 1938, 1938 (1987) (critiquing Elman's critique).

⁷¹ 347 U.S. 483 (1954) (*Brown I*); 349 U.S. 294 (1955) (*Brown II*).

⁷² *Brown I*, 347 U.S. 483; *Brown II*, 349 U.S. 294. As we (and many, many) others have written elsewhere, *Brown* by no means brought an end to segregation in education or anywhere else in American society. There were a number of reasons for this, including subsequent Supreme Court Justices who were appointed specifically to lessen *Brown*'s impact.

⁷³ Detailed accounts of this litigation are documented in John H. Blume, Theodore Eisenberg & Sheri Lynn Johnson, *Post-McCleskey Racial Discrimination Claims in Capital Cases*, 83 CORNELL L. REV. 1771 (1998).

⁷⁴ *Id.* at 1782.

⁷⁵ *Id.*

chance less than one time in one thousand.⁷⁶ The study also established a strong association of “reduced” outcomes, i.e., plea bargain or conviction of less serious charge, dismissal or acquittal in black victim cases. In 78.2% of the black victim cases, the defendant received a reduced outcome, as opposed to 45.6% of the time in white victim cases. Again, this discrepancy could occur by chance less than one time in a thousand. The study concluded that in the absence of an explanation for the highly suspect racial pattern, intentional racial discrimination existed in the administration of homicide and capital cases in Charleston County.⁷⁷

But Matthews did not rest his case entirely on statistical evidence, even though the statistical evidence was focused, as *McCleskey* seemed to suggest it should be, on the actual decision-maker. Supporting the statistical study was evidence from former employers of the prosecutor’s office, from press accounts and from community leaders corroborating the empirical evidence of bias. A former assistant prosecutor in the office testified that “the idea of the state seeking the death penalty did not appear to enter into the calculus” in black victim cases.⁷⁸ Another former prosecutor provided a sworn declaration to the effect that in considering whether to seek the death penalty in a deal eligible case the office decided not to do so because the victim was “just a little old black man.”⁷⁹ A twenty-five year veteran of the police force testified that the prosecutor routinely sought tougher sentences in black defendant cases. Numerous ministers and persons involved in community organizations seconded the former police officer’s views.

Other evidence supporting Matthews’ contention of racial bias included evidence of discrimination in the hiring, promotion and treatment of African-Americans in the prosecutor’s office, public statements made by the prosecutor blaming crime rates on moral decay in Charleston’s African American community and his strong support for keeping the Confederate flag flying on top of the State Capitol Building.⁸⁰ Finally, Matthews pointed to the facts of his case including that he was only nineteen years old at the time of the offence, had a minimal prior record and was even described by one of the arresting officers as not a “hard nosed” criminal.⁸¹

The federal district court, however, made short work of Matthews’ claim concluding that because a) *McCleskey* “indicated a reluctance to question the discretionary decisions of prosecutors,” b) the offense was a “crime for which the law permits the imposition of the death penalty” and c) there was no direct evidence that the prosecutor “sought the death penalty in his case for a

⁷⁶ *Id.*

⁷⁷ *Id.* at 1782–83.

⁷⁸ *Id.* at 1783.

⁷⁹ *Id.* at 1783–84.

⁸⁰ *Id.* at 1785–86.

⁸¹ *Id.* at 1787.

discriminatory purpose” the claim failed.⁸² The court did not dispute that any of the evidence Matthews presented was true; it simply took the position that even if it were all true, Matthews did not demonstrate that race played a role in the prosecutor’s decision to seek death. As we have noted elsewhere, that finding cannot be “squared with reality.”⁸³

Matthews’ claim is just one of literally hundreds of unsuccessful post-*McCleskey* claims presented to courts over the last twenty-five years alleging ongoing, continued and systematic racial bias in the administration of capital punishment. Post-*McCleskey* challenges to individual death sentences have been raised in most states that have the death penalty as well to death sentences imposed under the federal death penalty scheme. Most are summarily rejected with the reviewing court observing, much as the court did in *Matthews*, that *McCleskey* rejected claims based on statistical evidence of racial disparities in capital sentencing and then holding that the defendant presented no evidence of discriminatory purpose in his case.⁸⁴ In one particularly shameful case, the court concluded that the prosecutor’s statement to a witness “do you give a fuck if we fry your nigger or not” did establish discriminatory purpose—but that the claim failed because the defendant had failed to prove discriminatory effect!⁸⁵

Examination of the one (and only) successful post-*McCleskey* case only reinforces the sense of shame at what courts will tolerate under the blessing of *McCleskey*. Theodore Kelly was convicted and sentenced to death for a double homicide in Spartanburg County, South Carolina. Following an unsuccessful direct appeal, Kelly filed a post-conviction challenge to his death sentence. During an evidentiary hearing, Kelly’s post-conviction counsel serendipitously elicited the following testimony from the deputy solicitor:

I told [Solicitor Gossett] that I felt like the black community would be upset though if we did not seek the death penalty because there were two black victims in this case The only mention that was ever made of race was when I said that I felt like if we did not seek the death penalty, that the community, the black community, would be upset because we are seeking the death penalty in the [Andre] Rosemond case for the murder of two white people.⁸⁶

Faced with this statement, the court discounted the fact that the deputy solicitor

⁸² *Matthews v. Evatt*, No. C/A 3:95-132-3BC, slip op. at 13–14 (D.S.C. Mar. 26, 1996), *aff’d* 105 F.3d 907 (4th Cir. 1997), *cert denied*, 522 U.S. 833 (1997).

⁸³ *Blume et al.*, *supra* note 73, at 1788.

⁸⁴ *See, e.g.*, *United States v. Jacques*, No. 2:08 cr 117, 2011 WL 1675417, at *5 (D. Vt. May 4, 2011).

⁸⁵ *Cornwell v. Bradshaw*, 559 F.3d 398, 411 (6th Cir. 2009).

⁸⁶ Sheri L. Johnson, *Litigating for Racial Fairness after McCleskey v. Kemp*, 39 COLUM. HUM. RTS. L. REV. 178, 179 (2007).

denied that race was the only reason the state sought death in Theodore Kelly's case, reasoning that race "can never be an intentional factor, in any degree whatsoever, in the State's decision to seek death."⁸⁷ Thus, the court set aside Kelly's death sentence, and he was ultimately resentenced to life imprisonment. The ultimate irony is that the only post-*McCleskey* case in which race discrimination in capital sentencing claim succeeded is one that involved a black defendant and a black victim. No relief has ever been granted to a black defendant charged with killing a white victim, despite the fact that this is the classic form of race discrimination of which statistical proof was offered in *McCleskey* and which persists today.⁸⁸

B. Scholarship

1. On Segregation

Plessy assumed that no harm came from the stigma of forced segregation, and while Harlan asserted that common sense and experience contradicted that assumption, no social science evidence was available to corroborate his claim. Post-*Plessy*, however, a number of African-American sociologists, including Franklin Frazier at Howard and Charles Johnson at Fiske, studied aspects of black life and the pernicious effects of segregation.⁸⁹ In the 1930s and 1940s there were several important works including *The Shadow of the Plantation*, *Southern Regions of the United States*, and Myrdal's *An American Dilemma* discussing the detrimental effects of segregation in housing, transportation and other aspects of black life and the "vicious circle of cumulative causation."⁹⁰ There were also a number of studies of black schoolchildren and the effects of race on their sense of self-identity. These early studies revealed, somewhat counter-intuitively, that

⁸⁷ *Id.*

⁸⁸ We are not sure that irony is the right word, but the fact that the court granted Kelly a new sentencing trial (which ultimately resulted in a life sentence) stands in stark contrast to the treatment given Keith Simpson's challenge to his death sentence in the same judicial circuit. Simpson, who is African-American, was sentenced to death for the murder of a white store owner during a botched armed robbery in rural Spartanburg County. *Id.* at 182. Simpson presented strong statistical evidence of racial discrimination by the elected prosecutor in Spartanburg County, i.e., in the fifteen year period between 1987 and 1993 (the year of Simpson's crime); the prosecutor sought the death penalty in 50% of the 52 white victim death eligible cases and in 0 of the 19 death eligible black victim cases, a result which could occur by chance less than 4 times in 1000. *Id.* at 181-82. Simpson's statistical assertions were supported by an internal memo prepared by an assistant prosecutor recommending that the State seek death because Simpson made a statement about how he "hadn't killed a white man." *Id.* at 184. The post-conviction court in Simpson's case summarily dismissed the claim as being barred by a prior decision of the South Carolina Supreme Court rejecting statistical evidence. *Id.*

⁸⁹ See RICHARD KLUGER, *SIMPLE JUSTICE* 310 (2004).

⁹⁰ *Id.* at 310-11, 313.

students were more aware of race in racially segregated schools.⁹¹ Kenneth B. Clark, a professor at the City College of New York, conducted what are often referred to as the “doll studies” with black children. Clark would show the children gender neutral black and white dolls and then ask them a series of questions about which doll they liked best, which doll looked most like them, etc. What he found was an “unmistakable preference” for the white dolls and he concluded that the children realized early in life that success, beauty, and status belonged to the white race.⁹² Clark’s work was replicated by a number of other social scientists.⁹³ When Thurgood Marshall and others at LDF discovered Clark’s work, they retained him to assist in the *Brown* litigation. He performed the doll studies on students in the segregated schools at issue in the cases and obtained the same results.⁹⁴

Initially, it seems odd that it was the doll studies alone, and not the broader literature on detriments of racial segregation that the *Brown* Court cited in overturning *Plessy*. But it was the focus on those studies that permitted the Court to limit the apparent breadth of its holding to segregated schools, rather than immediately condemning all of Jim Crow.⁹⁵ The broader condemnation, however, was quick in coming, suggesting that it was not really the doll studies alone that persuaded the Court; in summary per curiam decisions citing *Brown*, the Court invalidated state-imposed segregation in other public facilities.

2. On Race and Capital Punishment

After *McCleskey*, scholars have continued to examine a variety of race effects in the administration of capital punishment. Both on state-wide and local levels, significant race effects, especially race of victim effects, persist to this day.⁹⁶ In short, the salience of race has not diminished since *McCleskey* was decided. In fact, post-*McCleskey* scholarship has established that race permeates the entire

⁹¹ *Id.* at 317.

⁹² *Id.* at 315, 317.

⁹³ *Id.* at 318–319.

⁹⁴ *Id.* at 330.

⁹⁵ As one contemporary commentator noted:

Brown . . . placed emphasis on the intangible factors that the *Plessy* doctrine inapplicable to public schools. Education is an experience and not simply an enjoyment of physical facilities. But with respect to common carrier and public recreational facilities, the emphasis is upon the enjoyment of the physical facilities and services so it is more nearly possible to speak of equality of enjoyment within the pattern of segregation.

Paul G. Kauper, *Segregation in Public Education*, 52 MICH. L. REV. 1137, 1154 (1954).

⁹⁶ See, e.g., David C. Baldus & George Woodworth, *Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research*, 41 NO. 2 CRIM. L. BULL. 11 (2010); Gennaro F. Vito, *The Racial Justice Act in Kentucky*, 37 N. KY. L. REV. 273 (2010); Michael Mears, *The Georgia Death Penalty: A Need for Racial Justice*, 1 J. MARSHALL L. REV. 23 (2008).

capital punishment system. Evidence of racial bias has been documented not only in prosecutorial charging decisions, but also in jury decision making,⁹⁷ judge sentencing in capital cases,⁹⁸ and among capital defense lawyers.⁹⁹ In addition, among African-American defendants, a new study shows that more stereotypically black-looking defendants are, controlling for other factors, significantly more likely to receive death sentences than are lighter skinned defendants with less stereotypically black features.¹⁰⁰

Moreover, since 1987, much additional scientific evidence has accumulated that documents the continued prevalence of racial bias, and its influence on decision-making. This additional evidence has come from three different subfields of psychology. First, new research—due mostly to new technology—has tackled the issue of people who “fake” non-prejudiced attitudes. This research includes measures of implicit attitudes, such as the “IAT,” subliminal prompts of race, and quick response tasks like word pairing. Second, new technology permits the study of brain activity directly, prompting research that tracks the neurological correlates of prejudice, documenting differences in the areas and length of brain activation that depend on the race of the target being viewed. Finally, cognitive psychology in general has grown enormously, and some of the general research on biased processing and unintentional influences on decision-making has been applied to race.¹⁰¹

Viewed together, the field studies of capital punishment and the laboratory studies of prejudice make it clear that if any member of the *McCleskey* majority thought that racial disparities in capital sentencing would subside over time, he was (at least with respect to the next quarter of a century) badly mistaken.

V. ENGINES OF CHANGE

The end of Justice Brennan’s impassioned dissenting opinion reflects on both the moral obloquy due the majority for ignoring core values of racial equality because “those granted constitutional protection in this context are those whom society finds most menacing and opprobrious,”¹⁰² and the practical consequences of deserting those values. In so doing, he quotes *Plessy* dissenter Harlan:

⁹⁷ Mona Lynch & Craig Haney, *Mapping the Racial Bias of the White Male Capital Juror: Jury Composition and the “Empathic Divide”*, 45 LAW & SOC’Y REV. 69 (2011).

⁹⁸ John H. Blume, Theodore Eisenberg, Sheri L. Johnson, Valerie Hans & Martin Wells, *The Death Penalty in Delaware: An Empirical Study*, IOWA L. REV. (forthcoming 2012).

⁹⁹ Theodore Eisenberg & Sheri L. Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539 (2004).

¹⁰⁰ Jennifer Eberhardt & Sheri L. Johnson, *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital Sentencing Outcomes*, 17 PSYCHOL. SCI. 383, 383 (2006).

¹⁰¹ Sheri L. Johnson, *Litigating for Racial Fairness after McCleskey v. Kemp*, 39 COLUM. HUM. RTS. L. REV. 178, 190–201 (2007) (reviewing the literature).

¹⁰² *McCleskey v. Kemp*, 481 U.S. 279, 343 (1987) (Brennan, J., dissenting).

It is tempting to pretend that minorities on death row share a fate in no way connected to our own, that our treatment of them sounds no echoes beyond the chambers in which they die. Such an illusion is ultimately corrosive, for the reverberations of injustice are not so easily confined. "The destinies of the two races in this country are indissolubly linked together," (quoting Harlan, J., dissenting) and the way in which we choose those who will die reveals the depth of moral commitment among the living.¹⁰³

This paragraph, though it may have been written in disgust or despair, when considered in light of the engines of change that led to *Brown*, offers hope that *McCleskey* too will someday have a red flag beside it that reads "No longer good for at least one point of law."

A. *The Moral Bankruptcy of the Opinions*

Theodore Parker, a nineteenth century abolitionist, wrote:

I do not pretend to understand the moral universe; the arc is a long one, my eye reaches but little ways; I cannot calculate the curve and complete the figure by the experience of sight; I can divine it by conscience. And from what I see I am sure it bends towards justice.¹⁰⁴

This sentiment was echoed—and somewhat more concisely expressed—by a far better-known champion of equality, Dr. Martin Luther King, who put it: "The arc of the moral universe is long, but it bends toward justice." Somewhat belatedly, even the author of *McCleskey*, Justice Powell, came around to the view that it was wrongly decided.¹⁰⁵ Argument will not convince the skeptical reader, but in the long run, we think the moral truth is the surest predictor that *McCleskey*, like *Plessy*, will be consigned to the less-than-glorious past.

B. *Practical Forces*

In addition to the moral bankruptcy of both opinions, we think there are some practical parallels between *Plessy* and *McCleskey* that may predict the demise of the latter.

¹⁰³ *Id.* at 344 (Brennan, J., dissenting).

¹⁰⁴ Theodore Parker, *Of Justice and the Conscience*, in TEN SERMONS OF RELIGION 66, 8485 (Boston, Little, Brown & Co. 1855).

¹⁰⁵ JOHN C. JEFFRIES, JUSTICE LEWIS F. POWELL, JR. 442–43 (1994).

1. Plessy

i. Black Soldiers Returning from Combat

As Derrick Bell has observed, black veterans returning from World War II faced both continuing discrimination and violence.¹⁰⁶ Their resulting disillusionment was no secret. As black actor Paul Robeson angrily declared in 1949, "It is unthinkable . . . that American Negroes would go to war on behalf of those who have oppressed us for generations . . . against a country the Soviet Union which in one generation has raised our people to the full human dignity of mankind."¹⁰⁷ Whether fear that such sentiment was widespread influenced the Court in *Brown* is not apparent from the litigation, but it is clear that the related concern that world opinion might be swayed toward communism by ongoing racial discrimination in the United States was in many people's minds.

ii. International Competition with Communism

In the 1950s, the federal government became attentive to Communist countries trying to use reports of racial violence and discrimination in the United States to gain the allegiance of African and Asian nations.¹⁰⁸ The federal government's amicus brief in *Brown*, as well the party brief of this concern, urged the Court that striking down constitutional protection for racial segregation would improve America's image both abroad and at home.

Thus, it may be that self-interest fueled the demise of *Plessy*, as well as did moral enlightenment. If so, there are parallel forces at work today with respect to *McCleskey*.

2. McCleskey

i. Changing Demographics

America is still a majority white nation, but not for long. Most studies predict that in less than thirty years a majority of Americans will be people of color.¹⁰⁹ The inevitability of that fundamental shift in the demographics of the United States

¹⁰⁶ Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980).

¹⁰⁷ *Id.*

¹⁰⁸ Derrick A. Bell, Jr., *Racial Remediation: An Historical Perspective on Current Conditions*, 52 NOTRE DAME L. REV. 5, 12 (1976); MARY DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 107 (2000).

¹⁰⁹ *The Changing Face of America: Time-Lapse Map Reveals How Non-Whites Will Become the Majority In U.S. within 30 Years*, DAILY MAIL (May 27, 2011), <http://www.dailymail.co.uk/news/article-1391346/The-changing-face-America-Time-lapse-map-reveals-non-whites-majority-U-S-30-years.html>.

will almost certainly have significant political implications, e.g., the likely demise of the Republican Party,¹¹⁰ and corresponding shifts in the demographics of the Congress, state legislatures, and the federal and state judiciaries. It is difficult to imagine that the new non-majority majority will have the same tolerance for racial discrimination in the administration of capital punishment or the “fear of too much justice” noted by Justice Brennan in his *McCleskey* dissent. Thus we are optimistic that the “changing face” of America will play a significant role in determining *McCleskey*’s viability—just as it did in the 1950s.

ii. The Inevitability of Abolition

Looming larger than the demise of *McCleskey* is the likely demise of all capital punishment in the United States; notably, ours is now the only western style democracy in the world that executes its own citizens. And by a variety of measures, in the United States, enthusiasm for capital punishment is waning. In the last few years, four states have abolished capital punishment.¹¹¹ Other states are seriously considering whether to abandon the death penalty, including California, which has the nation’s largest death row. Even in retentionist states, the number of new death sentences has dropped dramatically in recent years, as have the number of executions.¹¹² Moreover, public opinion polling indicates that when given alternatives to capital punishment, e.g., life without parole, support for the death penalty falls below 50%.¹¹³

The diminution in support for capital punishment appears to be primarily driven by three phenomena. First, the cost of maintaining the death penalty in tight budgetary times; the average execution costs taxpayers anywhere from two to twenty million dollars, dollars that even previously adamant supporters think might be better spent elsewhere. Second, more than one hundred and twenty-five persons sentenced to death in this country have subsequently been exonerated, and the risk of executing the innocent seems more real than it did in the past. And finally, the availability of life without parole (LWOP) as an alternative punishment; with the option of LWOP now available in all states, support motivated by fears of future dangerousness is substantially undercut.¹¹⁴ Thus, *McCleskey* may die a natural death, taking its last gasp along with the death

¹¹⁰ 90% of the votes that Republicans receive come from white voters. Non-whites, even affluent non-whites, overwhelmingly support Democratic candidates. Kevin MacDonald, *The Republican Party is Doomed*, OCCIDENTAL OBSERVER (Sept. 14, 2011), <http://www.theoccidentalobserver.net/2011/09/the-republican-party-is-doomed>.

¹¹¹ The four states are: Illinois, New Jersey, New Mexico and New York. An abolition bill passed in Connecticut but was vetoed by the Governor. John H. Blume, *The Times They Are A Changin’ (Or Are They?)*, CORNELL LAW SCHOOL FORUM (Spring 2010), http://forum.lawschool.cornell.edu/Vol36_No1/Feature-5.cfm.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

penalty itself. Not a moral victory, but we will take it.

VI. CONCLUSION

In my opinion, the judgment this day [in *Plessy*] will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott Case.¹¹⁵

So wrote Justice Harlan at the end of his dissent in *Plessy*. Almost sixty years later, *Brown v. Board of Education*'s¹¹⁶ unanimous Court would agree with Harlan, and overturn "separate but equal." But the *Brown* Court declined to say that *Plessy* was wrong, relying instead upon new studies that showed the unequal effects of separation. It took almost another forty years for a majority of the Court to admit that "*Plessy* was wrong the day it was decided."¹¹⁷ We think that for the parallel reason laid out above, *McCleskey*, like *Plessy*, was "wrong the day it was decided." But even if that is not plain to everyone today, we think that "the [*McCleskey*] Court's explanation for its decision was so clearly at odds with the facts apparent to the Court [now] that [a] decision to reexamine [*McCleskey* is] on this ground alone not only justified but required."¹¹⁸

¹¹⁵ *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

¹¹⁶ 347 U.S. 483 (1954).

¹¹⁷ *Planned Parenthood v. Casey*, 505 U.S. 833, 863 (1992).

¹¹⁸ *See id.* ("[W]e must also recognize that the *Plessy* Court's explanation for its decision was so clearly at odds with the facts apparent to the Court in 1954 that the decision to reexamine *Plessy* was on this ground alone not only justified but required.").

